

**STATE OF MICHIGAN**  
**DEPARTMENT OF LICENSING & REGULATORY AFFAIRS**  
**OFFICE OF FINANCIAL AND INSURANCE REGULATION**  
**Before the Commissioner of Financial and Insurance Regulation**

**In the matter of**

**XXXXXX**

**Petitioner**

**v**

**File No. 122808-001**

**Consumers Life Insurance Company**

**Respondent**

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**Issued and entered**  
**this 9<sup>th</sup> day of January 2012**  
**by R. Kevin Clinton**  
**Commissioner**

**ORDER**

**I. PROCEDURAL BACKGROUND**

On August 10, 2011, XXXXX (Petitioner) filed a request for an external review with the Commissioner of Financial and Insurance Regulation under the Patient's Right to Independent Review Act, MCL 550.1901 *et seq.* The Commissioner accepted the Petitioner's request for external review on August 17, 2011.

The Petitioner receives health benefits under a nongroup policy and prescription drug rider issued by Consumers Life Insurance Company. Consumers Life is a subsidiary of Medical Mutual of Ohio.

Initially, this case appeared to involve only contractual issues so the case was not assigned it to an independent medical review organization for analysis of medical issues. Upon further evaluation, the Commissioner determined the case included medical issues which warranted an external medical review. The results of that review were submitted to the Commissioner on October 24, 2011. (A copy of the complete report is being provided to the parties with this Order.)

**II. FACTUAL BACKGROUND**

The Petitioner had prostate cancer for which he received radiation treatments. As a result, he now suffers from hypogonadism and reports severe symptoms of depression and

fatigue which require testosterone replacement therapy. His urologist prescribed Testim 1% (a testosterone gel) to treat his condition. Consumers Life denied coverage for the drug because its prescription drug rider excludes coverage for all name brand prescription drugs.

The Petitioner appealed the denial through Consumers Life internal grievance process. Consumers Life affirmed its denial of coverage and issued its final adverse determination dated July 6, 2011.

### **III. ISSUE**

Is Consumers Life required to provide for coverage for Petitioner's Testim 1% prescription?

### **IV. ANALYSIS**

#### **Respondent's Argument**

In its final adverse determination of July 6, 2011, Consumers Life explained its denial of Testim:

The requested medication, Testim 1% (50MG) Gel, is not a covered medication under your prescription drug coverage. Under the provisions of your prescription drug benefits, brand name prescription drugs, except for insulin, are excluded under your coverage. Your prescription drug benefit does not cover brand name prescription drugs under any circumstance. This applies even if a brand name prescription drug is medically necessary and a generic prescription substitute is not available. This also applies even when your physician writes "dispense as written" on your prescription order.

#### **Petitioner's Argument**

The Petitioner wrote in his request for external review:

I am writing to request an appeal of Medical Mutual of Ohio's/Consumers Life's denial of insurance coverage for the drug prescribed to me (Testim® 1% [50mg/5g tube]). I am a 60-year-old male suffering from severe male hypogonadism, depression, and fatigue. This medication is being used strictly for treatment, not for athletic purposes. I would like to formally request an appeal of this denial as this replacement therapy is necessary to reverse the problems that may have been caused by my recent radiation treatments for prostate cancer. . . .

The Petitioner's urologist wrote:

[The Petitioner] has hypogonadism which may have been caused by radiation treatment for prostate cancer. He requires testosterone replacement therapy for his severe symptoms. Labs enclosed.

### Commissioner's Review

Consumers Life has not claimed that prescription drug coverage is excluded for testosterone replacement therapy required as a consequence of radiation treatment for cancer. Rather, Consumers Life has asserted only that the particular form of testosterone therapy is excluded because it is a brand name prescription drug. The Consumers Life policy, pages 27-28, provides:

#### **EXCLUSIONS**

In addition to the exclusions and limitations explained in the Health Care Benefits section, coverage is not provided for services and supplies:

\* \* \*

53. For Prescription Drugs, except as specified.

The prescription drug rider includes this provision:

**YOUR PRESCRIPTION DRUG BENEFIT DOES NOT COVER BRAND NAME PRESCRIPTION DRUGS UNDER ANY CIRCUMSTANCE. THIS APPLIES EVEN IF A BRAND NAME PRESCRIPTION DRUG IS MEDICALLY NECESSARY AND A GENERIC PRESCRIPTION DRUG SUBSTITUTE IS NOT AVAILABLE. THIS ALSO APPLIES EVEN WHEN YOUR PHYSICIAN WRITES "DISPENSE AS WRITTEN" ON YOUR PRESCRIPTION ORDER. THIS DOES NOT INCLUDE INSULIN.**

In order to determine whether a generic equivalent to the requested brand name drug is available, the Commissioner obtained the analysis of an independent review organization (IRO) as required by section 11(6) of the Patient's Right to Independent Review Act, MCL 550.1911(6). The IRO reviewer is a board certified urologist who has been in active clinical practice for more than 15 years. The IRO reviewer's report includes the following analysis and conclusion:

At issue in this appeal is whether there are any generic drugs available for treatment of the member's medical condition.

[T]he member has severe reduction in his serum testosterone levels. . . . [T]his form of hypogonadism can lead to significant health problems if left untreated. . . . [T]he member is already very symptomatic. . . . [T]he member's

testosterone needs to be replaced to maintain his health. . . .[T]his can be performed with depot testosterone injections. . . . [I]f depot testosterone is not available from a plan approved provider, use of another androgen replacement therapy would be appropriate.

[D]epot testosterone injections in generic form is available for treatment of the member's condition.

Because a generic equivalent for Testim is available, the Commissioner finds that Consumer Life's denial of coverage for Testim 1% is permissible. However, the Consumers Life policy and prescription drug rider are not consistent with the requirements of the Michigan Insurance Code provisions governing prescription drug coverage. Section 3406o of the Insurance Code, MCL 500.3406(o), provides:

An insurer that delivers, issues for delivery, or renews in this state an expense-incurred hospital, medical, or surgical policy or certificate that provides coverage for prescription drugs and limits those benefits to drugs included in a formulary shall do all of the following:

\* \* \*

(c) Provide for exceptions from the formulary limitation when a nonformulary alternative is a medically necessary and appropriate alternative. This subdivision does not prevent an insurer from establishing prior authorization requirements or another process for consideration of coverage or higher cost-sharing for nonformulary alternatives. Notice as to whether or not an exception under this subdivision has been granted shall be given by the insurer within 24 hours after receiving all information necessary to determine whether the exception should be granted.

Consumers Life's blanket exclusion of coverage for brand name drugs is not permitted under section 3406o. The policy and drug rider provisions cited in Consumers Life's final adverse determination may be cited only to support the denial of the requested brand name drug. Further, the denial of coverage for Testim is upheld only so long as coverage is provided for the generic equivalent drug.

## **V. ORDER**

The Commissioner upholds Consumers Life Insurance Company's final adverse determination of July 6, 2011.

This is a final decision of an administrative agency. Under MCL 550.1915, any person aggrieved by this Order may seek judicial review no later than 60 days from the date of this

Order in the circuit court for the county where the covered person resides or in the circuit court of Ingham County. A copy of the petition for judicial review should be sent to the Commissioner of Financial and Insurance Regulation, Health Plans Division, Post Office Box 30220, Lansing, MI 48909-7720.

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R. Kevin Clinton  
Commissioner